

This record is a partial extract of the original cable. The full text of the original cable is not available.

C O N F I D E N T I A L SECTION 01 OF 04 THE HAGUE 002736

SIPDIS

DEPARTMENT FOR S/WCI - PROSPER/RICHARD, EUR - STEPHENS;
EUR/SCE - GREGORIAN/MITCHELL, L - LAHNE/GTAFT, INR/WCAD -
SEIDENSTRICKER/MORIN; USUN FOR ROSTOW/WILLSON

E.O. 12958: DECL: 1.6 FIVE YEARS AFTER CLOSURE ICTY

TAGS: [BK](#) [HR](#) [KAWC](#) [NL](#) [PHUM](#) [PREL](#) [SR](#) [ICTY](#)

SUBJECT: ICTY: "WHO'S RUNNING THIS COURT?"

REF: THE HAGUE 2494

Classified By: Legal Counselor Clifton M. Johnson per 1.5(d).

[1](#)1. (C) Summary: A rare appeals chamber hearing in the International Criminal Tribunal for the former Yugoslavia (ICTY) case against Slobodan Milosevic heard sharp and well-presented arguments this week on the imposition of counsel on the accused. Defense counsel Steven Kay pleaded with the appeals chamber to restore to Milosevic substantial control over the presentation of his defense, admitting that counsel (i.e. his team) have become "ineffective" and unable to say they are acting in the best interests of justice and the accused. Milosevic, back on the stage again, made a vigorous, impassioned, and cogent -- if often factually misleading -- presentation for the chamber to "restore" his right of self-representation. Lead prosecutor Geoffrey Nice, with chief prosecutor Carla Del Ponte sitting silently by his side, asked the appeals chamber to affirm the trial chamber, wondering aloud, "who's running this court, the judges or the accused?" The hearing came following another week of witnesses failing to appear for Milosevic's defense. End summary.

Counsel Appeal

[1](#)2. (C) President Theodor Meron, presiding judge of the Appeals Chamber, opened the hearing by noting that the question of assigning counsel to Milosevic "has been percolating in one form or another since very early on" in the trial. He reviewed the main elements of the appeal and the prosecution's response. Three central thematic questions appeared relevant to Meron: One, to what extent can the individual right to defend oneself as one chooses be modified in order to ensure a fair and expeditious trial? Two, does the Tribunal need additional and more current information on Milosevic's health -- including an examination by a physician of the accused's own choosing and consideration of whether he is manipulating his health -- in order to affirm the need for imposed counsel? And three, has the decision to impose counsel so changed the dynamics and reality of the defense that it has proved to be unworkable in practice? Throughout the hearing, Meron also expressed a separate, juridical worry -- namely, the extent to which the appeals chamber may review a trial chamber decision concerning imposition of counsel. (Comment: Given this appeals chamber's previous exercise of broad discretion to review trial chamber decisions, this may signal less a legal constraint than an unwillingness to reopen a difficult decision by the trial chamber. End comment.) He also assured the litigants, in response to a comment from Kay, that the completion strategy "has no bearing" on the chamber's assessment of this appeal, as "we are here to do justice."

[1](#)3. (C) Defense counsel Kay contended that the trial chamber imposed counsel following a "concerted attack" by the prosecution on Milosevic's right to represent himself, and he gave a bleak picture of the course of his efforts to defend the accused. He asked the chamber not to consider the prosecution's arguments that Milosevic manipulated his health to obstruct the trial and, in response to a follow-up question from Meron, suggested that a new medical exam, including by one of the accused's own doctors, should be conducted (as Milosevic requested in September). The prosecution had argued that Milosevic had not raised this issue in a timely manner, but Kay said that the imposition of counsel -- the "most extreme" of the options before the trial chamber -- came as a "complete surprise" to the accused. Meron quickly interjected, "how could it?", to which Kay gave a raft of reasons suggesting that the trial chamber had led Milosevic to believe that it would do something less than impose counsel in the way that it did, such as impose stand-by counsel available to assist or in case of the accused's ill-health. (Note: Emboffs learned from a Registry source with regular contact with Milosevic that he was actually prepared to accept a stand-by counsel proposal. The decision to not only impose counsel on him but give that counsel the lead and authoritative role in his defense -- putting Milosevic in the second chair, so to speak -- likely surprised Milosevic as much as it did other court observers.

End note.)

14. (SBU) Kay argued that irrespective of how the Court got itself to this point, the bottom line was that one risk -- delays in the trial caused by ill health -- had been replaced with another, the denial of a real defense case in the face of non-participation of witnesses and the accused. Kay concluded that he and his co-counsel "are ineffective" and that, as a result of the trial chamber's decision, Milosevic is not obtaining a real defense. His suggested remedy was one he had put forward to the trial chamber in September: Milosevic should appoint counsel or represent himself, putting the responsibility on him to conduct his own defense; if that means taking only one day a week to conclude the case over the next several years, that would be acceptable to him. But to determine whether that would in fact occur, he said, the court needs a new medical report.

15. (SBU) Milosevic expressed his "deep conviction" that the trial chamber acted as it did not for health reasons but for "political reasons," the result of a "campaign conducted not to permit me to speak." He challenged the prosecution's assertion that he manipulated his health, saying that a good percentage of his sick days were from the flu, not from his chronic hypertension. He added that his blood pressure had improved over time, adding that the stress of putting on the case in what he defined as a short time allotted by the trial chamber contributed to his poor health (though he did not see that this presented an argument for imposing some form of counsel in itself).

16. (SBU) Milosevic, aside from points relating to his health and some typical political posturing, mostly limited himself to making a legal case for self representation. He cited a "petition" of lawyers from around the world arguing that his right to self-representation could not be modified or minimized, and referred to U.S. constitutional protections under the Sixth Amendment. "I would like for my right (of self-representation) to be restored to me," he said, and he saw no middle-ground in the assigning of a "stand-by counsel" to assist in his work. He has "no objection" to Kay continuing to ask questions of witnesses, much as he did when he was the amicus curiae (friend of the court). But "the only thing I can see as just, fair, logical and reasonable is to give me back my right to call witnesses myself, to examine them, and to lead evidence in my defense case." This is, he said, guaranteed him under international law, including "your own Statute." Finally, he said, "I cannot agree to anything less because that is my principled position, one from which I do not intend to retreat so much."

17. (SBU) Nice would have none of the appeals for sympathy sought by Kay and Milosevic. Instead he argued that everything Milosevic said "show(s) that this man is not capable now of presenting a case before what is manifestly a straightforward criminal court trying him for criminal offenses." He should not, Nice said, be allowed to "carry on" before judges "whom he has quite wickedly impugned." He presented an alternate account of the way in which the chamber came to assign counsel, showing that the prosecution had repeatedly urged the trial chamber to impose counsel to assist, but not necessarily overtake, Milosevic's defense. That said, the prosecution "entirely support" the trial chamber decision and its "modalities" (i.e., the placing of defense counsel in the lead role and forcing Milosevic to seek permission to examine witnesses). Nice further suggested that the modalities could change if Milosevic were to show himself behaving in a rational, sensible and cooperative manner in the courtroom. Summing up, he noted sharply, "who's running this court, the accused or the judges who have been appointed to do so?"

18. (C) Meron closed by suggesting that the chamber may seek further supplemental briefing from the parties on specific issues. However, in a later conversation, Meron told Emboff that "the fog is clearing" in the way he views the case and that a decision should be expected soon. Separately, Nice asked emboff, sounding anxious, what he thought of the proceeding. When the question was turned around, Nice said that one of the members of his team thought the defense had the better of it. Nice expressed concern that any change in the modalities by the appellate chamber could lead to a situation where the accused, more than ever, believes he can dictate his views to, and manipulate, the trial chamber.

The Defense Muddles Along

19. (SBU) The trial chamber met briefly on October 18 to review Kay's newly filed witness list and discuss his prospects for getting witnesses to appear. The list, which is not public, is divided into experts, internationals, and insiders and, as best could be divined from context, includes 138 names with contact information, as well as the status of the defense's efforts to contact each witness and persuade him/her to testify. Kay is still having virtually no success

-- there was the usual rehashing of witnesses refusing to testify in opposition to the assignment of counsel -- but the judges did focus in on a few prospects. Two are Germans awaiting approval from either the German government, the EU, or OSCE -- the Registry has put in the request on Kay's behalf but it is unclear which institution is holding up the process. One, Henning Hensch from the OSCE/KVM, appears likely to testify soon. With respect to the other, Dietmar Hartwig, former head of the ECCM, Judge Robinson explicitly said to Kay that if the necessary consents have been given, that witness still refuses to come, you may want to invite the Chamber or request the Chamber to issue a binding order.⁸

10. (SBU) The defense on October 19 examined Leona Kanelli, an independent member of the Greek Parliament connected to the Communist Party. Kanelli, also the publisher of the magazine Nemesis, visited Aleksinac in southern Serbia shortly after NATO started bombing in 1999. The substance of her testimony centered on pictures she took and reports she published about the destruction of the town, but much of her actual testimony took the form of dramatic and combative monologues about the innocents killed by NATO bombing and the tragedy of war in general. The trial chamber was patient with her but, when she called into question the legitimacy of the court itself, Judge Robinson interrupted to inform her that her comment was completely out of order.⁸ Prosecutor Geoffrey Nice's cross-examination went to Kanelli's assertion that there was no military target in Aleksinac, producing a Human Rights Watch report already in evidence that detailed the intended target, the Aleksinac Deligrad military barracks. Kanelli's irreverence toward the court and Nice was striking, to the point that many in the audience gallery were by the end of cross-examination laughing at her.

11. (SBU) Milosevic did contribute slightly to the defense examination of Kanelli. He at one point helped the court in trying to locate Aleksinac on a map of Serbia and, when given the chance to examine Kanelli, did ask one question. He asked her, in English, if she had been asked all the agreed questions. She responded that Kay had asked only a small portion of them. When prompted by Judge Robinson to fill gaps in the examination in chief with his own questions, Milosevic said he would not enter the trial on the merits until his rights were restored.

Comment

12. (C) Meron has called the appeal of the imposition of counsel issue the most difficult decision of his tenure. If his chamber reverses the trial chamber, the case is certain to be held hostage once again to Milosevic's uncertain health. If he upholds the chamber's decision without modification, it seems equally certain that Milosevic will not engage the proceedings and that only a feeble and truncated defense will be put forward. The stakes are high: the legacy of the case, already shaken, depends on observers viewing the proceedings as legitimate, meeting the highest standards of fairness to the accused, and providing a persuasive basis for conclusions as to whether the prosecution proved its case beyond a reasonable doubt. The Prosecution seems uniquely content to have the case conclude within weeks and allow the trial chamber to move toward judgment. For others, who have in mind the larger legacy of the Tribunal -- and its ability to bring reconciliation to the region -- there is hope that the Appeals Chamber will strike the right balance between imposing counsel on Milosevic and permitting him to retain a reasonable degree of control over his defense, so that whatever the outcome, the credibility of the proceedings and the institution will withstand the test of time. End Comment.

SOBEL